Supreme Court, U.S.
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(2)

No. 95-1339

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN CONSORTI & FRANCES CONSORTI,

Petitioners,

v.

OWENS-CORNING FIBERGLAS CORP.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, for purposes of applying the *Erie* doctrine, a distinction exists between a state statute that imposes explicit monetary limits on damage awards in civil cases and a state statute that establishes substantive standards, other than explicit monetary limits, by which damage awards are to be limited?

2. Whether a federal court of appeals has failed to apply the traditional "abuse of discretion" standard of federal appellate review of a district court's denial of a Rule 59 motion where that court concludes, as a matter of law, that a damage award is excessive and orders remittitur of the excessive award to the maximum allowable legal limit.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent Owens Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglas Industries, Ltd.
Arabian Fiberglas Insulation Company
Asahi Fiber Glass Company, Ltd.
Fiberglas Colombia, S.A.
Scandinavian Glasfiber AB
Vitro-Fibras, S.A.

All parties to the appeal in the Second Circuit are listed in the caption of the petition.

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CONSTITUTION:

Due Process Clause, Amend. XIV ..... *passim*

Seventh Amendment..... *passim*

STATUTES:

N.Y. Civ. Prac. L. & R. §5501(c)
(McKinney Supp. 1995) .....*passim*

RESPONDENT'S BRIEF IN OPPOSITION

The sole basis upon which petitioners seek review of the judgment of the Second Circuit in this case is that it assertedly presents the same issues that are presently before the Court in *Gasperini* v. *The Center for Humanities, Inc.*, No. 95-719 (argued April 16, 1996). Under any reasonable reading of the Second Circuit's opinion in this case, however, this case presents *none* of the questions raised in *Gasperini*. Thus, rather than holding this petition for its decision in *Gasperini*, the Court should deny this petition forthwith.

I. COUNTER-STATEMENT OF THE CASE

In this personal injury tort action governed by New York substantive law, the jury returned a verdict against respondent exceeding $20 million, including a total of $12 million for non-economic damages for the pain and suffering endured by petitioner John Consorti after he contracted mesothelioma. The federal district court, sitting in diversity, declined to disturb this verdict. On appeal, the Second Circuit, as is plain from that court's opinion, applied New York's substantive standard of material deviation from reasonable compensation as set forth in N. Y. Civ. Prac. L. & R. § 5501(c)(McKinney Supp. 1995) and, as a matter of New York law, determined that the historic range of damages for pain and suffering under that New York legal standard is between $1 million and $3 million in all asbestos personal injury cases involving mesothelioma tried under New York law. Accordingly, the Second Circuit ordered a remittitur of the verdict to $3.5 million unless petitioners agreed to undergo a new trial. In

reaching this decision, the Second Circuit did not "review," in either a constitutional or a non-constitutional sense, any "fact" tendered to or determined by the jury in this case. Because its decision and application of a pure point of law disposed of this case, the complex questions raised by the Second Circuit's decision in *Gasperini* are not present in this case.

A. The District Court's Opinion

After verdict, Owens Corning moved, *inter alia*, for a new trial or a remittitur based upon the excessiveness of the verdict. In denying Owens Corning's post-trial motions, the district court did not indicate whether it believed that its review of the size of the verdict was controlled by § 5501(c). That statute does not permit a verdict for compensatory damages to "deviate[] materially from . . . reasonable compensation."[1] *See In re New York*

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[1] On its face, § 5501(c) applies only to courts of the Appellate Division; this may explain the silence of the district court as to the applicability of § 5501(c) to its review of Owens Corning's claim of excessiveness. It is, however, settled that New York trial courts are to apply the "reasonable compensation" standard in reviewing verdicts challenged as excessive at the post-trial stage of cases. *See, e.g., Inya* v. *Hyundai, Inc.*, 209 A.D.2d 1015, 619 N.Y.S.2d 440 (4th Dep't 1994). Owens Corning notes that the substantive standard set forth in § 5501(c) is not merely an effort by the New York legislature to prohibit "unreasonable" compensation. Rather, it is a standard by which courts can and must determine, in the absence of any more particularized guidelines from the New York legislature, the permissible *range* of compensatory damages that may be

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Asbestos Litigation, 847 F. Supp. 1086, 1102-07 (S.D.N.Y. 1994).

B. The Court of Appeals' Opinion

The Second Circuit began its analysis of the question whether the $12 million verdict for pain and suffering is excessive by making clear, at the outset, hat it was not second-guessing in any way the facts as necessarily found by the jury regarding either the quantity or quality of the pain and suffering petitioner John Consorti endured prior to his death. The court explained that its ultimate finding of excessiveness "in no way deprecates the enormous suffering that John Consorti endured." Pet. App. at 13a, 72 F.3d at 1009. The court continued:

> We take it as given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.

Pet. App. at 14a, 72 F.3d at 1009.

Turning to consideration of the $12 million verdict obtained by petitioner John Consorti, the Second Circuit articulated the first of the three questions it would

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awarded in particular cases and classes of cases and then apply that standard to particular cases.

ultimately decide in response to Owens Corning's excessiveness claim:

> The first step in deciding whether the award of $12 million for John Consorti's pain and suffering is excessive must be to ascertain whether federal or state rules apply.

Pet. App. at 18a, 72 F.3d at 1010. After reviewing various pertinent cases in the lower courts and this Court decided since *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Second Circuit concluded that the question "how much money John Consorti may be awarded . . . is an issue of substantive rights under the laws of New York." Pet. App. at 20a, 72 F.3d at 1011. The court's analysis is straightforward.

First, the court pointed out that if New York had, by statute, placed a specific dollar limit on the amount of damages recoverable in civil actions such as the case at bar, "federal courts ruling in diversity would unquestionably be bound by those substantive rules." *Id.* The court next observed that, while § 5501(c) does not place precise dollar limits on compensatory damage awards, that statute nevertheless prescribes "the substantive rule provided by New York law."[2] Under *Erie*, this substantive standard

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[2] As discussed below, the petitioner in *Gasperini* has attempted to persuade the Court that a material distinction can be drawn under *Erie* between a state statute setting a specific numerical "cap" on compensatory damages available in particular civil actions and a statute which, like § 5501(c), establishes substantive standards for determining the

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necessarily displaces the "shocks the conscience" standard that a federal district court would otherwise employ in determining whether a verdict in an action governed by federal law is so excessive as to warrant a new trial or a remittitur. Pet. App. at 20a, 72 F.3d at 1011-12.

Having determined that the New York substantive standard set forth in § 5501(c) governs this case, the Second Circuit addressed the second question before it: the content of that substantive standard in the context of asbestos personal injury actions involving substantial suffering and pain from mesothelioma. Pet. App. at 24a-28a, 72 F.3d at 1013-15. The court's analysis involved a comparison between the verdict in this case and a broad base of verdicts in similar cases tried under New York law. The court's analysis did not depend upon its evaluation, let alone rejection, of the evidence of petitioner John Consorti's pain and suffering. Based on its extensive analysis, the court concluded as follows:

> Given the consistent pattern, over a considerable number of cases of death by mesothelioma, of reduction of jury verdicts for pain and suffering by New York courts to figures ranging from approximately $1 million to a maximum of $3 million, we

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excessiveness of verdicts without setting precise dollar limits or ranges. Owens Corning respectfully submits that the proffered distinction is frivolous, particularly where, as here, application of the state standard involves nothing more than an examination of jury verdicts in analogous cases without any consideration of disputed factual issues.

> conclude an award exceeding $3.5 million would deviate materially from what is deemed reasonable under New York law.

Pet. App. at 29a, 72 F.3d at 1015.

Having decided this question of New York substantive law, the answer to the third question addressed by the Second Circuit--application of that law to this case--was subsumed within and controlled by the court's answer to the second question. Without reference to any of the facts of the case at bar other than its total acceptance of the propositions that petitioner John Consorti had endured substantial pain and suffering and that his pain and suffering was comparable to that experienced by other victims of mesothelioma, the court "direct[ed] entry of a conditional order of a new trial on the issue of damages for pain and suffering, unless [petitioners] accept remittitur to" $3.5 million. Pet. App. at 29a, 72 F.3d at 1015-16.

II. NONE OF THE FOUR QUESTIONS PRESENTED MERITS REVIEW BY THIS COURT

Petitioners do not seek review of the question of New York law that effectively controlled the Second Circuit's disposition of their case--that any verdict for pain and suffering in an asbestos personal injury case involving extensive suffering from mesothelioma may not exceed $3.5 million because a verdict greater than $3.5 million would violate the "reasonable compensation" standard of § 5501(c). That is, of course, a question of state law that this Court would have no interest in reviewing in any event. Owens Corning's point, however, is that in reaching

this conclusion, the Second Circuit decided a *pure* question of state law that did not depend for its resolution, or its application to the $12 million verdict here, on the Second Circuit's "re-examination" of any "facts" as implicitly or expressly found by the jury in the case at bar. Under these circumstances, none of the questions presented by petitioners warrants review because this case, as decided by the Second Circuit, simply does not present those questions for review. Owens Corning will discuss each of petitioners' four "Questions Presented" in light of this crucial factor that is not necessarily present in *Gasperini*.

A. Question 1[3]

Where the Court has granted plenary review of a question presented by a case and another case subsequently comes on the Court's docket that properly presents that same question, the Court's usual practice is to hold the second case for its decision in the first case and then to dispose of the second case as appropriate in light of its decision in the first case. In their Question 1, petitioners vaguely assert that their case presents "the identical issue" on which this Court granted review in *Gasperini*. The petitioner in *Gasperini* presented three questions on which the Court granted review:

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3 "1. Where this Court has already granted certiorari in the case of *Gasperini* v. *The Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), *cert. granted*, No. 95-719, __ S.Ct. ___ (1996) WL 18430, 64 USLW 3349 (U.S., Jan. 19, 1996), on the identical issue, should this Court not grant certiorari in the present case?"

1. Should a federal appellate court exercising diversity jurisdiction apply a federal or state standard of review to the appeal of a district court's denial of a Rule 59 motion to set aside a jury award as excessive?

2. Absent trial error, does the Seventh Amendment's "reexamination clause" permit federal appellate review of facts found by a jury?

3. If federal appellate review of jury fact findings is permitted at all by the Seventh Amendment, what is the standard of review?

Although petitioners here attempt to persuade the Court that their case raises at least one question "identical" to one of the three questions before the Court in *Gasperini*, that attempt must fail because their case does not in fact present any of the three questions raised in *Gasperini*.

Although the analysis and nomenclature employed by the *Gasperini* petitioner are somewhat confusing, the gist of his position is that the Re-examination Clause of the Seventh Amendment limits the power of federal appellate courts to review or "re-examine" "facts" found by a jury, including "facts" determined by a jury in conjunction with its decision as to the appropriate amount of damages to award a plaintiff. According to the *Gasperini* petitioner, federal appellate review of a trial court's grant or denial of a motion for a new trial on the ground of an excessive verdict allows the appellate court to overturn the trial

court's refusal to grant a new trial as an "abuse of discretion" only if "there is no support in the evidence" for the amount of damages selected by the jury. Br. for Petitioner in No. 95-719 at 43.[4]

However the *Gasperini* petitioner's argument is understood, it is manifest that the *Gasperini* petitioner does not challenge the power of a federal district court to review "facts" found by a jury. Br. for Petitioner in No. 95-719 at 38 (motion for new trial on excessiveness ground may be adjudicated by federal district court consistently with Seventh Amendment). Perhaps more important, the *Gasperini* petitioner concedes that in a diversity case, a federal district court is to "evaluate the evidence of damages according to the factors provided by state law," Reply Br. for Petitioner in No. 95-719 at 3. Given this concession, Question 1 raised by the *Gasperini* petitioner does not directly challenge the proposition that, under *Erie*, a federal appellate court reviewing the denial of a Rule 59 motion for a new trial based on the asserted excessiveness

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[4] The argument made by the *Gasperini* petitioner essentially converts "abuse of discretion" review into legal review because in the total absence of evidence to support a verdict, the appellant prevails as a matter of law without the necessity for the appellate court to "weigh" or otherwise evaluate any evidence that is in the record. Were the Court to conclude in *Gasperini* that the Re-examination Clause requires that extraordinary result–one that essentially abolishes "abuse of discretion" review, the Court's holding would not affect the outcome of this case for reasons set forth in the text below. It is *a fortiorari* that were the Court to reject this position of the *Gasperini* petitioner, the judgment of the Second Circuit in this case would have to stand.

of the verdict must also apply the New York standard of "reasonable compensation." Rather, the *Gasperini* petitioner's argument is that the Seventh Amendment's Re-examination Clause trumps *Erie* if, in applying New York's substantive standard, the federal appellate court must "re-examine" "facts" found by the jury.

Where, as here, the federal appellate court has interpreted and applied the New York standard without weighing or "re-examining" *any* "fact" found by the jury, this Court's anticipated answer to Question 1 raised by the *Gasperini* petitioner is of no consequence to the outcome. This is so because even if the Court agrees with the *Gasperini* petitioner that, as a general matter, rulings on Rule 59 motions implicating "facts" are to be reviewed by federal appellate courts for abuse of discretion, that conclusion of the Court would do nothing to prohibit *de novo* appellate review of a pure issue of law that is dispositive of the federal appellate court's review of an appeal seeking to overturn the denial of a Rule 59 motion by a federal district court. In short, if a Rule 59 motion is erroneously denied because the federal district court makes a mistake of law, review of that error of law is *de novo* and does not even implicate the Seventh Amendment.

B. Question 2[5]

On its face, this question asks whether the Second Circuit in this case was required to review the district court's refusal to grant a new trial as an "abuse of discretion" rather than *de novo*. Petitioners' analysis of an answer to this question, however, assumes that the review conducted by the Second Circuit of the excessiveness issue involved something other than a pure question of law upon which direct *de novo* federal appellate review would otherwise be entirely proper.[6] But, and as previously

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5 "2. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with this Court's decisions in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977)?"

6 As noted above, it may be that the district court in this case failed to apply the New York substantive standard established by § 5501(c) and that it might arguably have been appropriate for the Second Circuit to have remanded this case to the district court with directions to determine the content of the New York standard and to apply that standard to this case in the first instance. Where, however, a federal court of appeals reaches out to decide a pure issue of state (or federal) law not decided by a district court, there is no insult done to the proper functioning of the district court, and judicial efficiency may, as here, often be the by-product. Because petitioners here do not challenge the Second Circuit's decision that New York law prohibits an award of damages for pain and suffering greater than $3.5 million in this type of case, there would be no point to sending this

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discussed, the review conducted by the Second Circuit here involved decision of a pure question of law. The court of appeals determined the content of the New York substantive standard and applied that legal standard to this case without weighing any evidence or second-guessing any factual or quasi-factual determination made either by the jury or the district court. The court of appeals thus determined that the district court's denial of Owens Corning's Rule 59 motion had to be reversed on a point of law, not on the basis of insufficiency of the evidence at trial or any other defect in that evidence. That is precisely the role carved out for federal appellate courts in the determination of issues of state law by this Court's decision in *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). The Second Circuit's faithful performance of this role, the substantive result of which is not challenged by petitioners in this Court, is not a matter that is worthy of this Court's attention.

C. Question 3[7]

Question 3 essentially restates Question 2 as raising an intra-circuit conflict with other decisions of the Second

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case back to the district court to apply the New York law as already determined by the court of appeals.

[7] "3. In this asbestos-related diversity action involving the jury's award of damages for Mr. Consorti's torturous and unremitting pain and suffering from mesothelioma over a 32-month period, upheld by the District Court, did the Second Circuit err by applying a state standard, and not the federal standard, of appellate review to determine whether the jury's award was excessive, in direct conflict with its own prior holdings, as well as the holdings of other circuits?"

Circuit and a broad inter-circuit conflict among the various federal circuits. None of the federal appellate cases petitioners invoke, however, involved a situation in which a court of appeals applied a substantive state law limitation on the size of a compensatory damage award and did so as a matter of law without "reviewing" *any* fact found by the jury. As Owens Corning argues above, *see* note 2 *supra*, there is no conceivable distinction under *Erie* between a state statute setting fixed limits on compensatory (or punitive) damage awards and a statute, such as § 5501(c), that provides less precise but no less substantive limitations on damage verdicts. Unless this Court would hold to the contrary, the relevant federal appellate decisions are those in which the federal courts of appeals have uniformly enforced state statutory caps on damage awards.[8] There is

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[8] Although the constitutionality and applicability of state statutory damage "caps" in diversity cases have been litigated with some frequency, Owens Corning has not identified a single reported decision in which both the parties and the court did not assume the applicability of the state "cap" as a matter beyond any possible dispute under *Erie*. *See, e.g.*, *Patton* v. *TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996). The absence of any such reported case is not surprising because there is no plausible argument that *Erie* would not bind a federal court to apply the state "cap" unless the "cap" were otherwise unconstitutional. In *Davis* v. *Omitowoju*, 883 F.2d 1155 (3d Cir. 1989), the Third Circuit rejected a Seventh Amendment challenge to the application of a numerical "cap," reasoning that the legislature's predetermination of that limit could have been imposed on the jury either pre-verdict (through a proper instruction) or post-verdict (through judicial review) and, thus, applying the "cap" at the post-verdict stage could not possibly run afoul of the Seventh Amendment as constituting review of a "fact" found by the jury. The Second Circuit's determination that

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no inter-circuit conflict on this point, which is the point actually raised by the case at bar, nor is there any reasonable argument that a court of appeals could refuse to apply such state law standards to diversity cases.[9]

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§ 5501(c) is to be interpreted as setting a limit of $3.5 million on damages for pain and suffering in personal injury asbestos cases involving death by mesothelioma stands on no different constitutional footing.

9 In *Gasperini*, the Second Circuit appeared to consider the sufficiency of certain evidence adduced at trial to support the verdict as measured against the substantive standard established by § 5501(c). The petitioner in *Gasperini* appears to take the position in this Court that such application of controlling law to facts involves the direct review and displacement of "facts" found by the jury or, in the alternative, that such application involves a mixed question of law and fact the "review" of which is barred at the federal appellate (but not the trial) level by the Re-Examination Clause of the Seventh Amendment. It is not evident to Owens Corning why the application of law to facts by an appellate court should be regarded as the "review" of facts in a constitutional sense unless the court of appeals literally reverses a factual finding made by the jury and proceeds to redetermine that factual issue. However that may be, it is manifest in the case at bar that the Second Circuit did not "review" any factual finding of the jury, because its determination that New York law limits damage awards to $3.5 million in all cases similar to the case at bar was based on facts capable of judicial notice--*i.e.*, jury awards in other similar cases--not on disputed factual issues that were actually presented to the jury at the trial of the case at bar.

D. Question 4[10]

The Second Circuit's opinion makes no mention of the Seventh Amendment for the simple reason that that Amendment was never invoked by petitioners in the district court or the Second Circuit. Having failed even to invoke the Seventh Amendment in the courts below, petitioners may not now rely on that Amendment in this Court, nor would they be entitled to the benefits of any decision that might be rendered by the Court in *Gasperini* on the Seventh Amendment questions that would otherwise be favorable to petitioners. *See United States* v. *Williams*, 112 S. Ct. 1735, 1738-39 (1992); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 258-59 (1987); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992).

Even if, however, petitioners had invoked the Seventh Amendment in the courts below or the Second Circuit had, *sua sponte*, considered the impact of that Amendment on this case, the result would be the same because the Seventh Amendment does not stand as a bar to the grant of a new trial by a federal appellate court based on *legal* error.[11]

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10 "4. Does the Seventh Amendment permit a federal appellate court to overturn a jury award as excessive, particularly where the trial judge considered and rejected a post-trial claim of excessiveness under Fed. R. Civ. P. 59?"

11 There is no colorable argument that, under English common law as it stood in 1791, a jury would have played any role whatsoever in determining the appropriate range of recovery of damages in cases to be heard by other juries. Thus, it is

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III. CONCLUSION

There being no basis upon which petitioners would be entitled to any relief no matter how this Court decides *Gasperini*, the petition should be denied.

April 30, 1996

Respectfully submitted,

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clear from a long line of this Court's cases, most recently the Court's decision in *Markman* v. *Westview Instruments, Inc.*, No. 95-26 (Apr. 23, 1996), that the formulation of such a general damages rule and its application to a specific case do not implicate the Seventh Amendment.